89-765 (1)

Supreme Court, U.S.
FILED
OCT 11 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

JOHNNY WHITFIELD,

PETITIONER,

VS.

UNITED STATES OF AMERICA

RESPONDENT.

CORRECTED PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DONALD W. DAVIS
1732 N.E. 36TH ST.
OKLAHOMA CITY, OKLAHOMA 73111
(405) 427-8386
COUNSEL OF RECORD

LEWIS BARBER, JR.
1528 N.E. 23RD, SUITE 410
OKLAHOMA CITY, OKLAHOMA 73111
(405) 424-5201

ATTORNEYS FOR PETITIONER

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

JOHNNY WHITFIELD,

PETITIONER,

VS.

UNITED STATES OF AMERICA

RESPONDENT.

CORRECTED PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

QUESTIONS PRESENTED

Whether Officers, who had no articulable facts which tended to show Defendant's involvement in criminal activity, had a reasonable suspicion to conduct a search and seizure?

Whether an initial acknowledgement of ownership of a bag and a subsequent denial thereof constitute abandonment?

TABLE OF CONTENTS

	PAGE(S)
TABLE OF AUTHORITIES.....	iii, iv
OPINIONS BELOW	1
STATEMENT OF JURISDICTION.....	2
STATEMENT OF THE CASE.....	4
ARGUMENT.....	8
The United States Court of Appeals for the Tenth Circuit was clearly erroneous in affirming the trial court's decision which denied Whitfield's Motion to Suppress	
A. THE OFFICERS DID NOT HAVE A REASONABLE SUSPICION THAT WHITFIELD WAS INVOLVED IN A CRIMINAL ACTIVITY.....	8
B. REASONABLE SUSPICION MUST BE BASED ON FACTS KNOWN PRIOR TO THE STOP.....	16
C. WHITFIELD DID NOT ABANDON HIS LEGITIMATE EXPECTATION OF PRIVACY.....	21
CONCLUSION.....	25
CERTIFICATE OF SERVICE.....	26

AFFIDAVIT OF MAILING..... 27

APPENDIX A: Opinion of United States District Court for the Western District of Oklahoma.

APPENDIX B: Opinion of the United States Court of Appeals For the Tenth Circuit.

TABLE OF AUTHORITIES

PAGE(S)

SUPREME COURT CASES:

Dunaway v. New York,
442 U.S. 200,
99 S.Ct. 2248 (1979)..... 17

INS v. Delgado,
466 U.S. 210,217,
104 S.Ct. 1758,1763 (1984)..... 10

Rakas v. Illinois,
439 U.S. 128,
99 S.Ct. 421, (1978)..... 21

Reid v. Georgia,
448 U.S. 438,
100 S.Ct. 2752 (1980)..... 14, 18

Schneckloth v. Bustamonte,
412 U.S. 218, 249,
93 S.Ct. 2041, 2059 (1973)..... 24

Terry v. Ohio, 392 U.S. 1,
88 S.Ct. 1868 (1968)..... 10, 13
17, 18
20

United States v. Cortez,
449 U.S.411, 417,
101 S.Ct. 690, 695 (1981)..... 11, 19

United States v. Sokolow,
109 S.Ct. 1581, 1585 (1989)..... 11, 12
13, 14
17, 19
20

FEDERAL CIRCUIT CASES:

United States v. Knox,
839 F.2d 285
(6th Cir. 1988)..... 21, 22
23

CONSTITUTIONAL AMENDMENTS:

U.S. Const. amend. IV..... 3, 10
17, 21
24, 25

U.S. Const. amemd. XIV..... 24

STATUTES:

28 U.S.C. § 1254..... 2

OPINIONS BELOW

The United States District Court for the Western District of Oklahoma rendered its decision on April 11, 1988, denying Whitfield's Motion to Suppress. Appeal was taken in the United States Court of Appeals and on August 9, 1989, the appeals court affirmed the decision of the District Court. Both opinions are contained herein as Appendix "A" and Appendix "B," respectively.

STATEMENT OF JURISDICTION

The date of the judgement sought to be reviewed is August 9, 1989. The court from which relief is sought is The United States Court of Appeals for the Tenth Circuit. This Court has jurisdiction to review this appeal pursuant to 28 United States Code Section 1254.

The constitutional provision which this case involves is Amendment IV which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

The basis for federal jurisdiction in the court of first instance was a violation of Title 21 U.S.C 841 (a)(1), and Rule 12 (b)(3) of the Federal Rules of Criminal Procedure.

Petitioner, Johnny Whitfield, Appellant below, Defendant at trial, (hereinafter referred to as "Whitfield" or "Petitioner") is a Black male, 25 years in age. On February 25, 1988, Whitfield was observed by two officers at Will Rogers World Airport departing Delta Airline Flight #15 from Los Angeles, California. The officers were monitoring flights and working a narcotic detector dog at the airport. The range of the officers' experience in the narcotic detail was talking with members of various airport task forces, reading

literature on the subject of airport details, and training with airport surveillance detectives for one day in Tulsa, Oklahoma.

The officers followed Whitfield through the airport and observed him greet another individual, later identified as Johnny L. Davis, his uncle. The officers further observed Whitfield give a red travel duffel bag that he had carried off the airplane to Mr. Davis. Thereafter, Mr. Whitfield went towards the baggage check area while Mr. Davis left the area.

The officers then approached Mr. Davis and asked him if the duffel bag was his. Mr. Davis replied that the bag was not his and that someone had given the bag to him. The officers took the bag from Mr. Davis and returned to the

interior of the terminal in order to find Whitfield. They spotted Whitfield and then followed him to a ticket counter and approached him and asked him if the red duffel bag belonged to him. Whitfield mumbled something and the officers again asked him if the bag belonged to him. Whitfield then acknowledged that the bag was his. The officers identified themselves as Oklahoma City Police Officers and asked Whitfield if they could speak to him. Whitfield consented to speak with the officers and accompanied the officers to a seating area. The officers again asked if the bag belonged to him and this time Whitfield denied ownership of the bag.

The officers then identified themselves as narcotics officers and demanded that Whitfield produce his

airline ticket and baggage claim ticket. Whitfield complied with the request and produced a ticket in the name of John Gibbs. The officers then demanded more identification and Whitfield produced a California driver's license in the name of Johnny Whitfield. The officers then asked Whitfield's permission to search the bag. Whitfield consented and the officers proceeded to search the bag. During the search of the contents of the bag, the officers felt a lump in the lining of a jacket that was in the duffel bag. When the officers commented on the lump, Whitfield attempted to leave the scene. The officers contend that Whitfield pushed them out of the way, thereby committing the crime of assault and battery on a police officer. The officers then arrested Whitfield for the

crime of assault and battery.

After the arrest, the officers went back to the duffel bag and jacket. The officers then cut the lining of the jacket with a pocket knife that belonged to one of the officers. The warrantless post-arrest search revealed two golf ball sized objects that the officers believed to be cocaine.

ARGUMENT

THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT WAS CLEARLY ERRONEOUS IN AFFIRMING THE TRIAL COURT'S DECISION WHICH DENIED WHITFIELD'S MOTION TO SUPPRESS

THE OFFICERS DID NOT HAVE A REASONABLE SUSPICION THAT WHITFIELD WAS INVOLVED IN A CRIMINAL ACTIVITY.

The United States Court of Appeals for the Tenth Circuit concluded that: "the detectives possessed a reasonable and articulable suspicion that Mr. Whitfield was engaged in a criminal

activity." This conclusion was had even though, at the suppression hearing, the officers failed to state the characteristics of the drug courier which Whitfield purportedly fit and failed to offer any articulable facts which placed Whitfield squarely within the boundaries of that drug courier profile. This conclusion has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

Whitfield concedes that after the search of the lining of the jacket, the officers had probable cause to arrest. However, until the discovery of the cocaine, the officers did not have a reasonable suspicion that Whitfield may have been involved in criminal activity.

Petitioner asserts that without a reasonable suspicion of criminal activity, the officers did not have any reason to approach Whitfield and make their initial inquiry of whether the duffel bag belonged to him.

Admittedly, under Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968), the police may stop and briefly detain a person for investigative purposes if they have a reasonable suspicion supported by articulable facts that criminal activity "may be afoot," even if they lack probable cause under the Fourth Amendment. However reasonable suspicion entails "some minimal level of objective justification" for making a stop INS v. Delgado, 466 U.S. 210,217, 104 S.Ct. 1758, 1763 (1984). This Court has defined that level as being something

more than an "inchoate and unparticularized suspicion or 'hunch'." 392 U.S. at 27, 88 S.Ct. at 1883. but less than the level of suspicion required for probable cause. United States v. Sokolow, 109 S.Ct. 1581, 1585 (1989).

Additionally, this court has realized the difficulty involved in defining reasonable suspicion, and has determined that reasonable suspicion must be determined by "the totality of the circumstances." United States v. Cortez, 449 U.S.411, 417, 101 S.Ct. 690, 695 (1981). In the context of airport stops, this court has most recently held in Sokolow, supra, that "a court sitting to determine the existence of reasonable suspicion must require the agent to articulate the factors leading to the conclusion...." In Sokolow, when the

defendant was stopped, the agents knew, inter alia, that (1) he paid $2,100 for two airplane tickets from a roll of $20 bills; (2) he traveled under a name that did match the name under which his telephone was listed; (4) he stayed in Miami for only 48 hours, even though a round-trip from Honolulu to Miami takes 20 hours;(5) he appeared nervous during his trip; and (6) he checked none of his luggage. Id.

The Sokolow court then concluded that "taken together they amount to reasonable suspicion." Petitioner respectfully contends that the linchpin of Sokolow is the quality of the information that was known by the law enforcement official prior to their initial stop of the defendant.

In the present case, at the

suppression hearing the officers could not articulate similar facts which were consistent with the drug courier profile which Whitfield purportedly fit. Instead, the officers were only able to testify about Whitfield's "nervousness", and that he seemed to be "looking for somebody in particular." Also the officers testified that Whitfield appeared to be "looking around" and "walking quickly through the airport." Petitioner would add that Whitfield's actions were not "unusual conduct", Terry, supra, but rather, typical actions of millions of airline passengers. Consequently, the officers possessed only an "unparticularized hunch" when they seized Whitfield. Terry.

Petitioner would show the Court that all of the factors in Sokolow were known

before the officers made any initial contact with the defendant, and were highly indicative of a drug courier. Petitioner would further show this Court that, prior to stopping Whitfield, the officers did not have the quality of information necessary to support a Sokolow-type stop.

In the case at bar, the officers failed to articulate any of the elements of the drug courier profile which Whitfield allegedly fit. Therefore there was no standard against which the trial judge could compare Whitfield's actions. Also, the officers failed to articulate any factors which are not common to a "very large category of presumably innocent travelers" Reid, infra. At the suppression hearing, the substance of Officer Ring's testimony was that

Whitfield was nervous and (regarding Whitfield giving the duffel bag to Mr. Davis) " ...And I thought this was especially strange, is that he didn't just hand the bag to him and he take it, it was strange that he extended his arm fully and laid it on the floor, and Mr. Davis --I didn't observe any conversation between the two individuals--Mr. Davis took the bag and hurriedly walked out of the airport with it."

As a result of the exchange, the officers approached Mr Davis and asked if the bag belonged to him. Mr. Davis' response was that:(1) the bag did not belong to him; (2) that he did not know the individual that handed him the bag; and (3) he had never seen the individual who handed the bag to him. Petitioner contends that the logical inquiry would

be: Why Mr. Davis would take a duffel bag from a complete stranger that he saw in an airport? Petitioner contends that, if any suspicion was raised, it was the result of Mr. Davis' actions. Therefore, if reasonable suspicion existed it was applicable only with regard to Mr. Davis. However, the officers did not detain Mr. Davis; but instead, seized the bag from Mr. Davis and attempted to locate Whitfield. Petitioner urges that at the time the officers approached him, they had no reasonable suspicion as to him, and; therefore, Whitfield's seizure was unlawful.

REASONABLE SUSPICION MUST BE BASED ON FACTS WHICH ARE KNOWN PRIOR TO THE STOP.

Petitioner contends that reasonable suspicion was present only after the officers stopped him and questioned him about the contents of the bag.

Therefore, the quality of the information known by the officers prior to Whitfield's seizure was insufficient to support a Sokolow-type stop.

For support of this position, Petitioner offers Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248 (1979) wherein this Court held: "the scope of a Terry-type 'investigative' stop and any attendant search must be extremely limited or the Terry exception would swallow the general note that Fourth Amendment seizures (and searches) are 'reasonable' only if based on probable cause." Id. at 214 Also in Dunaway this Court concluded that: " detention for custodial interrogation-regardless of its label-intrudes so severely on interests protected by the Fourth Amendment as necessarily trigger the traditional

safeguards against illegal arrest." 442 U.S. at 216, 99 S.Ct. at 2258. One year later, in Reid v. Georgia, 448 U.S. 438, 100 S.Ct. 2752 (1980), this court stated that "an arresting officer must have probable cause to suspect that an individual is or has engaged in criminal activity on the basis of observed circumstances to arrest an individual without a warrant" Id. at 441. Petitioner contends that Terry and its progeny stand for the proposition that reasonable suspicion and any subsequent investigative stops must be based on the observations of the officers prior to any police\citizen contact.

Petitioner asserts that, "on the basis of observed circumstances", Reid, supra, the officers had no reasonable suspicion that Whitfield was "involved in

a criminal activity." Id. Unlike the defendant in Sokolow, the officers in the present case had no prior information about Whitfield that when "taken together" amounted to reasonable suspicion. Id. at 1586. The "totality of the circumstances", Cortez, supra, indicate that: (1) the officers had actually trained only one day for airport surveillance detail (2) "no one in the officer's department was really that experienced in airport surveillance or airport techniques"; (3) the officers observed Whitfield depart from the aircraft with a duffel bag; (4) Whitfield "appeared to be looking for somebody in particular"; (5) Whitfield "continuously looked back at the crowd of people"; (6) Whitfield "appeared to be nervous and glanced a little bit longer than what

the average passenger would at the check point before proceeding towards the baggage claim area"; and, (7) Whitfield handed the duffel bag to Mr. Davis.

Petitioner contends that all of his actions "describe a very large category of presumably innocent travelers, who would be subject to virtually random seizures were the Court to conclude that as little foundation as there was in this case could justify such a seizure." 448 U.S.438, 441, 100 S.Ct. at 2754. As such, the officers had no reasonable suspicion which would warrant a Terry-type stop and certainly not a Sokolow-type stop. Finally, the trial court had no drug-courier standard against which to compare Whitfield's actions. For these reasons, the trial court was clearly erroneous in denying Whitfield's motion

to suppress.

WHITFIELD DID NOT ABANDON HIS LEGITIMATE EXPECTATION OF PRIVACY

The appellate court relied on United States v. Knox, 839 F.2d 285 (6th Cir. 1988) and erroneously held that: "because Mr. Whitfield disclaimed any interest in the bag, he did not have a reasonable expectation of privacy in it; thus, his Fourth Amendment rights were not violated by its search." Id. at 293. However, in Rakas v. Illinois, 439 U.S. 128, 99 S.Ct. 421, (1978) this Court held: "..to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." 439 U.S. at 143, 99 S.Ct. at 430. In the case at bar, Whitfield

had "a legitimate expectation of privacy" in the duffel bag.

Petitioner would show this Court that the gravamen of Knox was that the defendant "clearly did not establish or even attempt to establish any expectation of privacy in the bag since he never had possession nor did he ever claim any interest in the bag." Id. at . However, in the case at bar, the officers testified that they observed Whitfield carrying the duffel bag when he left the aircraft. Further, the officers testified: "...I said something to the effect of, "Excuse me sir, did you lose a bag?" He hesitated for a moment. I asked him again, "Is this your bag?" and he stated "Yes."

Accordingly, since Whitfield was initially in possession of the bag, and

the officers observed that possession, Knox, is inapplicable. Further, since Whitfield initially claimed ownership of the duffel bag, the Knox test of abandonment is not met. In the case at bar, as observed by the officers, Whitfield owned at least a possessory right in the bag and that observation cannot support a conclusion that Whitfield abandoned his legitimate expectation of privacy in the duffel bag.

Alternatively, at the time the officers took the bag from Davis, the seizure of the bag was unlawful. Also, Davis' response to the officers that he did not know who had given him the bag and his consent to release the bag to the officers was an "involuntary consent" which was given in recognition of coercive authority of the police.

Schneckloth v. Bustamonte. 412 U.S. 218, 249, 93 S.Ct. 2041, 2059 (1973). Thus it cannot be reasonably expected that Whitfield abandoned his "legitimate expectation of privacy" in the bag when he entrusted the same to his uncle; and, it was only out of fear and recognition of authority of police officers that the uncle not only disclaimed any interest in the bag, but in essence denied knowing the man who gave him the bag. It is clear that "Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion was applied, the resulting 'consent' would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed."

412 U.S. at 228, 93 S.Ct. at 2048. Here again, the case turns on observation of the police officers that would give rise to their investigation. Thus, since the seizure of the bag from Davis was accomplished without probable cause to believe that a crime had been committed, was being committed, or was about to be committed, then the acts of the officers must meet the burden of a warrantless search and seizure exception.

CONCLUSION AND PRAYER FOR RELIEF

WHEREFORE as premise considered, Petitioner prays that this Court grant his Petition for Writ of Certiorari.

Respectfully submitted,

Donald W. Davis
1732 N.E. 36th Street
Oklahoma City, OK 73111
(405) 427-8386

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of November, 1989, 3 copies each of the foregoing Corrected Petition for Writ of Certiorari were mailed, postage prepaid, to the following:

The Solicitor General
Department of Justice
Washington, D.C. 20530

and

Robert E. Mydans, U.S. Attorney
Ted Richardson, Asst. U.S. Attorney
Mike Ringer, Asst. U.S. Attorney
Room 4434, U.S. Courthouse
200 N.W. 4th
Oklahoma City, Oklahoma 73102

DONALD W. DAVIS

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

JOHNNY WHITFIELD,

PETITIONER,

VS.

UNITED STATES OF AMERICA

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

AFFIDAVIT OF MAILING

This Corrected Petition For Writ of Certiorari was mailed, first class postage prepaid and correctly addressed to the Clerk of the Supreme Court of the United States, on November 10th, 1989

from the Main Post Office, 320 S.W. 5th St., Oklahoma City, Oklahoma 73102.

Donald W. Davis
1732 N.E. 36th Street
Oklahoma City, OK 73111
(405) 427-8386

STATE OF OKLAHOMA)
) ss.
COUNTY OF OKLAHOMA)

Subscribed and sworn to before me this 16th day of November, 1989.

Notary Public

My Commission Expires:

[illegible]

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. CR-88-50-W
	)	
JOHNNY WHITFIELD,	)	
	)	
Defendant.	)	

ORDER

Before the Court is the Motion to Suppress Evidence of defendant, Johnny Whitfield, in the above-referenced matter. Defendant also moved to dismiss the Indictment against him, during the evidentiary hearing on his Motion to Suppress. Following said hearing, and upon due consideration of the testimony of witnesses, argument of counsel, submissions of the parties regarding applicable law, the Court makes the following findings:

1. Defendant Whitfield deplaned

with a maroon carry-on bag in his possession.

2. Detective Ring and Officer Bomgards had probable cause to arrest defendant Whitfield at Will Rogers Airport, Oklahoma City, Oklahoma, on February 25, 1988.

3. Detective Ring and Officer Bomgards had probable cause to seize the maroon carry-on bag they previously had observed in defendant's possession.

4. Defendant Whitfield was arrested when Detective Ring and Officer Bomgards identified themselves as police officers and requested that he accompany them for questioning to a public area of the Airport. The Court bases its conclusion the arrest had occurred on the fact that when defendant attempted to leave the public area in which he was being

questioned by the officers, he was tackled from behind by said officers.

5. The officers had probable cause to arrest defendant Whitfield, based upon the totality of the circumstances, to-wit: 1) they had observed defendant Whitfield pass the maroon carry-on bag to a black male by the ticket counter, subsequently identified as Johnny Davis; 2) when the officers approached Mr. Davis and questioned him, subsequent to the observed "hand-off," Mr. Davis stated he did not own the maroon bag, and was not acquainted with the man who had given him the bag; 3) Mr. Davis stated the man who had given him the bag had requested that he "check it" for him; 4) subsequently, the officers approached defendant Whitfield, who disclaimed ownership of the bag.

6. When Mr. Davis disclaimed ownership of the bag and stated he did not know the individual who had given him the bag, and placed the bag on the sidewalk outside the terminal, he abandoned it. Therefore, the officers lawfully took possession of the bag, in order to find the true owner thereof. The Court also notes Mr. Davis was asked whether he would mind if the officers took the bag, in order to find the owner thereof, and Mr. Davis voiced no objection.

7. Defendant testified under oath at the evidentiary hearing that the maroon bag was not his.

The Court relies upon the following conclusions of law, in support of its findings of facts stated above.

1. A seizure of a person occurs if

said person is not free to leave. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Only when an individual is free to leave an encounter, but voluntarily remains, is said encounter a "contact" and not a seizure or arrest. United States v. Mendenhall, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980).

2. A police officer may stop a suspicious individual and question him briefly, in order to confirm or dispel a suspicion of the officer. Terry v. Ohio, supra. The suspicion of the officer must be a reasonable suspicion based on articulable facts. Terry v. Ohio, id.

3. The reasonableness of an investigative stop depends upon facts and circumstances of the individual case, and should be analyzed in view of i) the

public interest served by the seizure, ii) the nature and scope of the intrusion, and iii) the objective facts upon which the law enforcement officer relied in light of his knowledge and expertise. United States v. MacDonald, 670 F.2d 910 (10th Cir. 1982) (citing United States v. Mendenhall, 466 U.S. at 561, 100 S.Ct. at 1881).

4. A warrantless arrest of an individual is proper if at the time of the arrest the officers had probable cause to believe that a crime was being or had been committed. Beck v. Ohio, 379 U.S. 89, 91 (1964).

5. Defendant had the burden of adducing facts at the suppression hearing which indicated his own rights were violated by the challenged search. Rakas v. Illinois, 439 U.S. 128, 130-31 n. 1

(1978). Fourth Amendment rights are personal and may not be asserted vicariously. Id. at 133-34.

6. Suppression of evidence will be an appropriate remedy only when a person's rights have been violated by the search itself; it is not sufficient that a person is aggrieved by the introduction of damaging evidence derived from such search. Alderman v. United States, 394 U.S. 165, 171-72 (1969).

7. Whether defendant Whitfield has standing to contest the instant search on Fourth Amendment grounds turns on whether he had a legitimate expectation of privacy in the area searched, not merely in the items seized. United States v. Salvucci, 448 U.S. 83, 931 (1980); United States v. Skowrouski, slip op. No. 86-2490 (10th Cir. Aug. 28, 1987).

8. Since defendant Whitfield testified under oath at the suppression hearing and stated in his affidavit filed with the Court that the maroon bag was not his, he lacks a legitimate expectation of privacy in said bag. Since defendant Whitfield lacks a legitimate expectation of privacy in said bag, he lacks standing to contest the instant search. United States v. Skowrouski, slip op. No. 86-2490 (10th Cir. Aug. 28, 1987).

The Court bases its denial of defendant's Motion to Suppress on the ground defendant lacked standing to contest the search. However, alternatively, the Court finds the following:

1. In the event defendant claimed ownership of the bag to the officers at

the time of his arrest, and subsequently consented to a search of said bag, the search was valid and did not violate defendant's Fourth Amendment rights.

2. In the event defendant denied ownership of the bag to the officers at the time of his arrest, such denial constituted abandonment of the bag. Therefore defendant's Fourth Amendment rights were not violated.

Therefore, the Court finds defendant failed to meet his burden of proof that he has standing to object to the search of the bag.

Accordingly, Defendant's Motion to Suppress is HEREBY DENIED.

ENTERED this 11th day of April, 1988.

/s/
LEE R. WEST
UNITED STATES DISTRICT JUDGE

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	No. 88-1890
v.	)	(D.C. No.
	)	CR-88-50-W)
JOHNNY WHITFIELD,	)	(W.D. Oklahoma)
	)	
Defendant-Appellant.	)	

ORDER AND JUDGMENT*

Submitted on the Briefs:

Before MOORE, ANDERSON, and BRORBY, Circuit Judges.

---

* This order and judgment has not precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicate, or collateral estoppel. 10th Cir. R. 36.3.

Mr. Whitfield claims his Fourth Amendment rights were violated when he was questioned by police at the Will Rogers World Airport in Oklahoma City, Oklahoma. We disagree and thus affirm the trial court's ruling. We take issue, however, with the trial court's rationale.

In short, we do not believe the detective's request to Mr. Whitfield to step out of the flow of traffic to answer questions rose to a restraint on freedom tantamount to an arrest. At most, the detective's act of accompanying Mr. Whitfield to a separate public area for questioning constituted a Terry stop. Florida v. Rodriguez, 469 U.S. 1, 5-6 (1984). On the other hand, it might very well be that this conduct constituted a police/citizen contact which does not implicate Fourth Amendment interests.

Rodriquez, 469 U.S. at 5-6; United States v. Poitier, 818 F.2d 679, 682 (8th Cir. 1987), cert. denied, 108 S.Ct. 700 (1988); United States v. Morgan, 725 F.2d 56, 59 (7th Cir. 1984). We need not decide this issue, however, because we find the detectives possessed a reasonable and articulable suspicion that Mr. Whitfield was engaged in a criminal activity.

Finally, we agree with the trial court that because Mr. Whitfield disclaimed any interest in the bag, he did not have a reasonable expectation of privacy in it; thus, his Fourth Amendment rights were not violated by its search. United States v. Knox, 839 F.2d 285, 293 (6th Cir. 1988), cert. denied, 109 S.Ct. 1742 (1989); United States v. Tolbert, 692 F.2d 1041, 1045 (6th Cir. 1982), cert. denied, 464 U.S. 933 (1983).

AFFIRMED.

The mandate shall issue forthwith.

Entered for the Court

John P. Moore
Circuit Judge